Supreme Court, U. S.
FILED
SEP 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, *etc.*, *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Although Petitioners Failed To Timely Petition For A Hearing In The California State Supreme Court, The Petitioners Have Met The Jurisdictional Requirement That A Decision Be The Decision Of The Highest Court Of The State In Which A Decision "Could" Be Had.

Section 1257 of Title 28 of the United States Code

provides in relevant part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows: . . . By writ of certiorari . . . . "

This Honorable Court has consistently over the years held that it is within its jurisdiction to review a case in which the decision of an intermediate court is the highest court of the state in which a decision "could" be had. (See, *e.g., Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965), and *Nash v. Florida Industrial Com.,* 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967)). The petitioners before this Honorable Court, although being one day late in filing a Petition For Hearing before the California Supreme Court (which said petition was refused), by filing a Petition For Relief From Default (which said petition was denied) and by filing a petition before the state supreme court to grant a hearing on its own motion (which said petition was refused), exhausted every possible route in gaining a hearing before said supreme court. In effect and in fact, therefore, the Court of Appeal, being the intermediate court in this case, is the highest court in which the petitioners "could" gain hearing and a decision. Furthermore, by its denying a timely Petition For Rehearing (while taking into account the California Supreme Court's *discretionary* denial of the petitioners' various petitions for review), the Court of Appeal was again rendered as the highest state court in which the petitioners "could" be heard and gain a decision. The Court of Appeal's decision is, therefore, a final decision

that is within this Court's jurisdiction to review pursuant to provisions of 28 U.S.C. § 1257 (see, *e.g., Gregory v. McVeigh,* 90 U.S. 294 [23 Wall 294] (1875)).

On numerous occasions the United States Supreme Court has held that where a case from an intermediate court is denied *discretionary* review by the state supreme court (as in our present case), such fact will not preclude the Court from reviewing the case. In this respect, this Honorable Court in *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968), held that under 28 U.S.C. § 1257 it could review a decision of the Texas Court of Appeals, where the Texas Supreme Court denied "discretionary" review. (Also see, *Chicago and E.I.R. Co. v. Industrial Com.,* 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304 (1932); *American Railway Express v. Levee,* 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); and *Minneapolis, St. P. and S.S.M. R. Co. v. Rock,* 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929).)

The petitioners were specifically notified by the California Supreme Court that their "application for relief from default and petition for hearing were presented to the court for its consideration" and that the state's highest court "directed" that the petition for hearing be denied because of the petitioners' untimely filing (see Appendix "C" to Petition for a Writ of Certiorari). The California Supreme Court, the petitioners were told, "seldom accedes" to such requests, thereby implying that it is within the court's *discretion* to hear the case (see Appendix "C" *supra*). If not, there would seemingly be no reason why the court would allow the petitioners' application for relief from default and petition for hearing

to be presented to it for its "consideration" (Appendix "C" *supra*). If the California Supreme Court does not exercise discretion in such an instance, then such an application would be denied summarily, but this was not the case.

In the petitioners' case there exists a substantial federal question that is of the utmost importance. At stake are the petitioners' rights to the freedoms of speech, association and religion under the First Amendment to the United States Constitution, as well as the equal protection of the laws as guaranteed to the petitioners under the Fourteenth Amendment. In this respect, the United States Supreme Court has repeatedly held, as in *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S. Ct. 820, 95 L. Ed. 1135 (1951), that even though the highest court of a state has, upon an adequate ground, refused to review on the merits a judgment of an intermediate appellate court deciding a federal question, the judgment properly before the Court is that of the intermediate appellate court, and is, therefore, reviewable by the High Court. (Also see, *Bacon v. Texas,* 163 U.S. 207, 16 S. Ct. 1023, 41 L. Ed. 132 (1896); *Missouri, K. and T.R. Co. v. Elliott,* 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673 (1902); and *Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).) Furthermore, the United States Supreme Court has held, as in *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), that a litigant's procedural defaults ought not always be permitted to bar vindication of important federal rights.

Those decisions of the United States Supreme Court which have denied certiorari on the basis of 28 U.S.C.

§ 1257 vary considerably from the petitioners' fact situation. For instance, in *Fisher v. Perkins,* 122 U.S. 522, 7 S. Ct. 1227, 30 L. Ed. 1192 (1887), a decision relied upon by the respondents, the party in that case willfully and deliberately failed (not by inadvertence as in the petitioners' situation) to make application to a superior court for an allowance of an appeal to the court of appeals of Kentucky. Therefore, the Court refused to review the decision of the superior court. This same willful and deliberate refusal by a party to seek review of the state's highest court, again, was the deciding factor in this High Court's unwillingness to exert jurisdiction in the other cases relied upon by the respondents in their Brief in Opposition to Petition for Writ of Certiorari (see, *e.g., Stratton v. Stratton,* 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142 (1925); *Gorman v. Washington,* 316 U.S. 98, 62 S. Ct. 926, 86 L. Ed. 1300 (1942); and *Gotthilf v. Sills,* 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963)). Moreover, the language of the Supreme Court in *Stratton v. Stratton, supra,* lends weight to the petitioners' contention that the present case is within the reviewable jurisdiction of this Honorable Court (239 U.S. at 56-57):

> "Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various states where discretionary power to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court."

It should further be noted that petitioners filed for

hearing before the state supreme court twenty-one days after a timely petition for rehearing was denied on March 30th by the Court of Appeal and eleven days after the date the original decision of the Court of Appeal became final.

The California Rules of Court (Rule 24) make no provisions for extended time, for purposes of petitioning for a rehearing, in setting the time limitations for petition to the state supreme court for hearing. This Honorable Court has clearly made that consideration, by case law in *United States v. Healy*, 376 U.S. 75, wherein it was held that a timely petition for rehearing renders the judgment not final for purposes of appeal until the court disposes of the petition for rehearing. California court rules do not follow this reasoning, and petitioners were burdened with restricted time within which to file their petition after denial of rehearing by the Court of Appeal on March 30, 1977.

Petitioners were limited to twenty days for filing, and made a strong good faith effort to make the filing timely.

After denial of relief from default by filing one day late, petitioners made further effort to expose the merits of the case to the state supreme court by petitioning said court to hear the matter on its own motion, which was within the power and discretion of the court to do so, as provided by Rule 28(a), Rules of Court. Nothing in the court rules restricts petitioners from filing such a petition, as it is within the court's discretion and power to grant such relief. The petition was made on the merits and the serious nature of the constitutional question at issue, and not as a mere boot-strap as alleged by respondents.

CONCLUSION

The intermediate Court of Appeal in this present case is the highest court of the state in which a decision "could" be had pursuant to 28 U.S.C. § 1257. Further, the petitioners contend that the California Supreme Court through its *discretion* denied review of the Court of Appeal's decision. Therefore, it is within this High Court's jurisdiction to grant the petitioners' petition.

Considering the magnitude of the federal question involved in the petitioners' fact situation, it would be within this Honorable Court's just propriety to hear this case since the outcome of this case affects the constitutional rights of countless students across the nation. Such a sacrifice of our precious and essential liberties should not, we submit, be made without this Court's review.

Respectfully submitted,

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Of Counsel:
KENNETH A. ROBERTS

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER 14 1977, I served the within SUPPLEMENTAL BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI (NO' 76-1739) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Court of Appeal
Fourth Appellate District
640 State Bldg., 303 W. 3rd St.
San Bernardino, Ca. 92401
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County Clerk, County of Orange
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Santa Ana, California 92701
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Rutan & Tucker
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David A. Lehrer
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Los Angeles, Ca. 90048
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 14th 1977, at HUNTINGTON BEACH, CALIFORNIA.

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